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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and Honeywell Retirement Savings Plan; and FIRST TRUST NATIONAL ASSOCIATION,

Petitioners,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether retroactive amendment of a state insurance guaranty association statute to specifically address coverage of an insurance product not previously addressed in the statute violates the Contract or Due Process clauses of the U.S. Constitution.

Whether a state insurance guaranty association statute creates contractual rights subject to the Contract Clause, where insurance purchasers have no contractual relationship with either the state or the association, where the state is not obligated by the statute, and where the terms of the statute are not incorporated into the insurance contract between the purchaser and the insolvent insurer.

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SUMMARY OF ARGUMENT

In 1991, a record 12 insurance companies operating in the state of Minnesota failed, jeopardizing more than $440 million belonging to over 46,000 Minnesota residents.

Through employer-sponsored defined contribution pension plans, over 19,000 Minnesota residents had invested in Guaranteed Investment Contracts ("GICs") issued by several of these insolvent companies. When these companies failed, the employers froze the retirement accounts of affected employees.

When the companies failed, the Minnesota insurance guaranty association statute, like the Model Act upon which it was based, was silent with respect to whether, or how, the statute applied to pension-GICs, and the state guaranty association was receiving conflicting claims from plan trustees and plan participants concerning how pension-GICs should be covered. No other state was acknowledging coverage of over 11,000 Minnesota residents employed by companies with non-Minnesota pension plan trustees.

Into this breach stepped the Minnesota Legislature, which in April of 1992 amended the Minnesota insurance guaranty association statute to specifically provide that 1) pension- GICs were covered by the Act, and 2) benefits under the Act were based on the residence of the individual Minnesota residents whose funds were invested in the GICs, not the residence of the trust companies which merely held the GICs in a fiduciary capacity.

The purpose of the Amendment was to assure that limited state guaranty association resources would flow solely to the Minnesota residents whose funds were at risk, not to local trust companies and their non-resident beneficiaries.

Because the statute did not previously address coverage of pension-GICs, the Legislature expressly stated that the amendment was intended to clarify the Act, and to apply to all insolvencies, including insolvencies declared prior to passage of the Amendment.

Honeywell, a multinational corporation headquartered in Minnesota, whose pension plans held GICs issued by insolvent Executive Life Insurance Company of California ("ELIC"), commenced this action to challenge the constitutionality of the 1992 Amendment, arguing that its Minnesota based trustee had a "contractual" right to coverage which was unconstitutionally "impaired" by the 1992 Amendment.

Honeywell's challenge has rightly been rejected by all courts which have heard it, including the district court, the Minnesota Supreme Court (on certified questions), and, finally, the Eighth Circuit Court of Appeals (en banc.).

Contrary to Honeywell's assertion in its Petition for Certiorari, the 1992 Amendment was not intended to improperly prefer the interests of a narrow group of claimants over those of Honeywell. As the Eighth Circuit found, the Act properly was designed to correct a significant, unanticipated gap in Guaranty Association coverage of Minnesota resident pension plan participants, and to avoid an unintended windfall to Minnesota based trust companies and their non-resident pension plan participants.

The Amendment most certainly did not, as Honeywell claims, "eliminate" protection for Honeywell's employees in connection with the ELIC insolvency. Under the Amendment, over 9000 of Honeywell's employees who are Minnesota residents will be protected.

Nor did the Amendment deprive Honeywell of bargained-for contractual rights. To the contrary, whatever rights the pre-amendment Act bestowed on Honeywell were purely statutory gratuities, and Honeywell had no bargained-for expectations concerning coverage of its ELIC GICs by the Minnesota Association. Honeywell concedes that the terms of the Minnesota Act were not incorporated into its ELIC GICs.

In upholding the Amendment the Court of Appeals closely followed controlling Supreme Court precedents. Honeywell cites no case in which this Court, or any other, overturned a retroactive modification of a state guaranty association statute on constitutional grounds. The Eighth Circuit's opinion in this case is not in conflict with the decision of any other court, much less one of this Court. Accordingly, this case does not present the Court with an opportunity to "settle" a significant area of federal law.

For these reasons, as discussed further below, the Association respectfully submits that this Court should deny Honeywell's Petition for a Writ of Certiorari.

STATEMENT OF CASE

A. The Executive Life Insolvency.

On December 6, 1991 the California Superior Court issued an order declaring Executive Life insolvent and ordering its liquidation. Guaranty Association Appendix ("GA"), filed with Court of Appeals, at 2. When Executive Life was declared insolvent, many employers froze the accounts of participants who had elected to invest in funds backed by Executive Life GICs. Approximately 19,000 Minnesota workers, employed by 16 different companies,

were in this situation. GA.8. Over half of the affected Minnesota employees were employed by companies without a Minnesota plan trustee. Id.

B. Guaranty Association Coverage of Pension-GICs: No Nationwide Uniformity.

The Minnesota Life & Health Insurance Guaranty Association Act ("Act"), passed in 1977, is one of fifty such insurance guaranty association statutes in the United States. These statutes are loosely patterned after the Model Life and Health Insurance Guaranty Association Act ("Model Act") of the National Association of Insurance Commissioners ("NAIC"). GA.5. Pursuant to the McCarran-Ferguson Act, the states, not the federal government, have exclusive regulatory responsibility for the insurance industry.[1] Under this state-by-state scheme, each state provides guaranty association benefits to its own residents affected by insurance company insolvencies.

Until its complete overhaul in 1993 after the Executive Life insolvency, the Minnesota Act was based on the 1971 and 1975 versions of the Model Act. GA.72, 88. Minn Stat. §61B.01 et seq.

Like these versions of the Model Act, the 1977 Minnesota Act did not mention pension-GICs. The Minnesota

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[1]The state's police powers in the area of insurance insolvency regulation pursuant to the McCarran-Ferguson Act are long-standing and well established. See 15 U.S.C. § 1012(a). See FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960) (purpose of Section 1012 is to allay doubts as to power of states to regulate insurance); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); First Nat'l Bank v. Taylor, 907 F.2d 775 (8th Cir.), cert. denied, 498 U.S. 972 (1990).

Act simply obligated the Association in connection with "annuity contracts" owned by "residents", and limited liability of the Association to "$100,000 in cash values, or $300,000 for all benefits, including cash values, with respect to any one life." Minn Stat. §§61B.02, subd. 1; 61B.06, subd. 2; 61B.06, subd. 8, Pet. App. at 116a-125a. See also 1975 NAIC Model Act, §§3 (1); 8(3); 9. GA.88-93.

These provisions were clearly drafted with individual contracts owned by individual residents in mind. Not addressed was whether, or how, these provisions might apply to a contract held by a pension plan trustee for the benefit of employee-investors residing in many different states.

Indeed, the Minnesota Supreme Court explicitly found, in responding to certified questions from the District Court in this case, that pension-GICs were not prevalent at the time of the statute's enactment in 1977, and, therefore, that the "legislature likely did not contemplate how the Act specifically applied to these contracts." Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 518 N.W.2d 557, 561 (Minn. 1994).

In December, 1985, the Model Act was extensively revised, and specifically provided for coverage of "unallocated annuity contracts," defined as "any annuity contract or group annuity certificate which is not issued to and owned by an individual." 1985 Model Act, § 5(n), GA.109. The Model specifically provided for coverage of such contracts based upon the residence of the "contract holders." 1985 Model Act § 3(a)(2), GA.105. The Model Act further imposed a limit of $5 million with respect to any one contract holder, irrespective of the number of unallocated annuity contracts held by that contract holder. 1985 Model Act § 3(c)(2)(B), GA.107.

The 1985 Model Act revisions presumed that all states would enact these changes and thereby create a seamless nationwide system of pension-GIC coverage. Unfortunately, this system never materialized.

As of 1991, when Executive Life became insolvent, most states, including Minnesota, had not incorporated the Model Act changes regarding pension-GICs. GA.5, 68, 69. Many had expressly rejected the Model, and instead excluded coverage of pension-GICs altogether. GA.5, 68, 69. As noted above, Minnesota was still operating under the 1971-1975 Model language which did not specifically state whether, or how, pension-GICs were covered.[2]

Contrary to Honeywell's suggestion, as of 1991 no court had considered how coverage of pension-GICs was to be determined under the Minnesota Act. While Minnesota's intermediate appellate court ruled in 1987 that the Minnesota Act's definition of "annuity" encompassed guaranteed investment contracts issued to defined contribution pension plans, that case did not discuss how coverage of such contracts was determined. Minnesota Life and Health Insurance Guaranty Association v. Dept. of Commerce, 400 N.W.2d 769, 773-74 (Minn. App. 1987). At issue in the 1987 case was whether pension-GICs ought to be included in the base from which member insurers were to be assessed to cover the

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[2]In sum, in 1991 when Executive Life became insolvent, states generally fell into one of the following categories: 1) states with a "new" Model Act, including pension-GIC coverage based on residence of the trustee; 2) states with a "new" Model Act, specifically excluding coverage of pension-GICs; 3) states with an "old" Model Act, enacted prior to 1985; 4) states with no guaranty association statute; and 5) states with new guaranty association legislation, but without retroactive coverage of 1991 insolvencies.

Baldwin United insolvency. The court ruled in that case that such contracts were covered by the Act, even though not expressly identified as "covered contracts," because the general purpose of the Act was to "protect the future financial stability of individuals." Id. at 773. Accordingly, the court concluded that pension-GICs were "covered contracts" and should be included in the assessment base. Since Baldwin United issued only individual annuities, and did not issue any pension-GICs, that insolvency case did not involve any coverage issues relating to pension-GICs.

Thus, contrary to Honeywell's bald assertion, nothing in the 1987 case "adjudicated" the issue presented in this case, i.e., how pension-GIC coverage is determined, whether based on the residence of the trustee or upon residence of the plan participants. Indeed, contrary to Honeywell's assertion, the Minnesota Court of Appeals' 1987 opinion, rather than supporting trustee coverage, clearly pointed the way toward participant coverage, in its observation that the purpose of the Act was to "protect the future financial stability of individuals." Id. at 773 (emphasis supplied). The court pointedly found that it was "clear the legislature intended that those who place their money in pension funds be protected." Id. at 774 (emphasis added.) The court clearly recognized that the legislature intended to cover the individuals whose funds are used to purchase pension-GICs, not the trustees who merely hold the GICs in a fiduciary capacity. Nothing in this opinion suggested that the Act would be interpreted to confer coverage on residents of other states merely because their pension plans employed a Minnesota-based trustee, or to deprive Minnesota residents of the Act's protection merely because the trustee of their pension plans resided in another state.

C. The Minnesota Problem: Conflicting Pension-GIC Claims.

As noted above, most of the 19,000 Minnesota residents whose accounts were frozen when Executive Life was declared insolvent were employed by companies with pension plan trustees not based in Minnesota. Unisys, for example, which employed approximately 7,500 Minnesota residents who had contributed to Unisys' pension-GIC backed retirement accounts, had a Pennsylvania-based trustee. GA.54. Pennsylvania, like Minnesota, had not incorportated the Model Act GIC provisions. GA.5, 68, 69. Approximately 350 Minnesota residents were employed by Xerox, which used a Massachusetts-based trustee. GA.2, 3, 57. Massachusetts had expressly excluded coverage of pension-GICs. GA.5, 68-69. About 9,000 residents were employed by Honeywell, with a Minneapolis-based trustee. GA.42.

Shortly after the announcement of the Executive Life insolvency, Unisys and Honeywell both demanded coverage from the Guaranty Association. Unisys sought coverage for its 7,500 Minnesota residents, based on the theory that the covered "ownership interest" was that of the resident participant, and that the residence of the trustee was irrelevant. Honeywell sought coverage for all of its approximately 35,000 employees worldwide, based on the fact that the trustee of its plans resided in Minnesota at the time of the insolvency. GA.3.[3]

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[3]Honeywell provides no support for its assertion that Honeywell was the only company with a Minnesota-based trustee affected by the 1992 Amendment. While at the time of the District Court proceedings Honeywell was the only company with a Minnesota-based trustee which had filed a claim against the Association in connection with ELIC pension-GICs, the Association has subsequently received claims from several other Minnesota-based trustees, including The Toro Company, the law firm of Fabyanske Svoboda Westra &

At the time of the Amendment, coverage of the ELIC pension-GICs, whether by Minnesota or any other state Association, was very much in doubt. As noted above, Minnesota fell into "Category 3," a state with a guaranty association act based on the pre-1985 Model, which did not specifically address pension-GIC coverage. The Pennsylvania Act was also "Category 3," based on the pre-1985 Model. GA.146. The Pennsylvania Life and Health Insurance Guaranty Association took the position that GICs were not covered at all by their Act because they were not a covered form of "annuity." GA.126-144. The Pennsylvania Department of Insurance maintained that GICs were covered, but still took the view that only Pennsylvania resident participants were entitled to coverage. GA.139-141.[4]

Moreover, the Minnesota Court of Appeals' 1987 ruling that GICs were "annuities" under the Minnesota statute remained subject to question at the time of the ELIC insolvency, and the possibility remained that the Minnesota Supreme Court might eventually rule, contrary to the court of appeals, that GICs were not covered at all by the 1977 Act. Some states have ruled that pension-GICs are not "annuities" within the meaning of the original Model Act language.[5]

Hart, P.A., and others. These trustees were affected by the 1992 Amendment in the same way that Honeywell was affected. In addition, the Amendment by its terms applies to several other insolvencies declared in 1991, including the insolvency of Mutual Benefit Life Insurance Company and InterAmerican Life Insurance Company, both of which had also sold pension-GICs to Minnesota trustees.

[4] The Pennsylvania Supreme Court ultimately adopted this view. See Unisys Corp. v. Pennsylvania Life & Health Ins. Guar. Ass'n, 667 A.2d 1199 (Pa. Commw. Ct.), aff'd 684 A.2d 546 (Pa. 1996).

[5] See, e.g., Arizona Life & Disability Ins. Guar. Fund v. Honeywell, Inc., 927 P.2d 806 (Ariz. Ct. App. 1996), review granted (Nov. 19, 1996); First Trust Nat'l Ass'n v. New Mexico Life Insurance Guaranty Association (N.M. Ct.

With over 7,500 Minnesota resident Unisys employees without coverage from the Pennsylvania Association, and with the fate of thousands of other residents unknown, On January 21, 1992, the Minnesota Commerce Department issued an opinion setting forth its view concerning whether and how the Act covered pension-GICs. The Department of Commerce is the agency charged with regulation of the Association. Minn. Stat. § 61B.04, subd. 4.

The Department determined that pension-GICs were, in fact, covered by the Act, and that coverage under the Act was intended to be determined by the residence of the plan participants, not that of the plan trustees. After administrative conferences with representatives of Honeywell, Unisys, the Minnesota Association, and others, the Department of Commerce issued a written opinion concerning coverage by the Minnesota Association of the Executive Life pension contracts. The Department opinion concluded that:

> [I]t is the clear intent of the Act to cover the people of Minnesota. Accordingly it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position, the Department has determined that non-resident employees of such a

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App., July 7, 1997) (reproduced at Respondent's Appendix, A-1-A-13.) Indeed, in First Trust, the New Mexico Court of Appeals ruled that it was "clear" that Honeywell's pension-GICs were not "annuities" and therefore not covered by the New Mexico guaranty association. Id, slip op at 11, A-12.

plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

GA.59, 159, 164 (emphasis added).

Minnesota Department of Commerce Commissioner Bert J. McKasy discussed the pension-GIC problem in testimony before the United States Congress on April 28, 1992. GA.171. According to Commissioner McKasy, in Minnesota alone approximately 46,000 residents had invested more than $440 million in 12 life insurance companies which had been taken over by regulators in 1991. GA.172.

Commissioner McKasy testified at length regarding the pressing need to clarify the Act's application to pension-GICs issued by these defunct companies. "Current Minnesota statutes, " according to McKasy, "do not specifically address GICs." GA.175. McKasy explained to Congress that Minnesota statutes were "unclear about protection for certain products, and in some cases the limits of coverage for other products are undefined." He explained that "over the years, new products have been developed and old products have been reshaped, but state laws have not been updated to reflect these changes." Pension-GICs, according to McKasy, were a "case in point."

McKasy described the Honeywell-Unisys situation in particular as a situation involving "GIC coverage issues affecting many other states," including "are GICs covered? If so, who is covered -- employees, employer, or trustee? And, up to what limits?"

McKasy explained the conclusion of the Minnesota Department of Commerce that "coverage applies to

employees, up to $100,000 per person, who at the time of impairment were residents of Minnesota." He opined that "unless other states take similar positions, significant questions will remain [such as] [w]ill Honeywell employees living and working in other states be covered by those states?" Commissioner McKasy made clear that the Department's interpretation of the statute "excludes [non-resident Honeywell employees] from coverage under the Minnesota Guaranty Association."

On April 27, 1992 the Minnesota Legislature ratified the ruling of the Commerce Department, amending the language of the Act to provide that the Act only covers individual participants in defined contribution pension plans who are residents of the state of Minnesota. Minn. Stat. § 61B.03, subd. 5(c) (West Supp. 1993). The Legislature expressly provided that the amendment to the Act was intended to clarify existing law, and applied to "all covered policies or contracts issued or renewed by insurers which become insolvent after May 27, 1977." 1992 Minn. Laws, ch. 540, art. 2, § 23.[6]

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[6]The following year, the Minnesota Legislature comprehensively overhauled the Minnesota Act, again specifically rejecting "contract holder" coverage regarding pension-GICs as contained in the Model Act. The current Minnesota law continues to determine coverage based upon the residency of the plan participant, not that of the plan trustee or contract holder, limits coverage to $100,000 per participant, and further establishes an overall cap of $7.5 million. See Minn. Stat. §61B.19, subd. 3(5). The 1993 legislation reiterated that the Executive Life and all other insolvencies, rehabilitations, or impairments prior to its effective date remained subject to the law in effect in 1992. 1993 Minn. Laws, ch. 319, § 19.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOLLOWED MODERN DUE PROCESS AND CONTRACT CLAUSE BALANCING TESTS.

A. Modern Standards Applicable to Retroactive Laws.

Stripped to its essential core, Honeywell's Petition is based on a long discarded theory of constitutional law: that the Constitution prohibits a state from modifying its statutes if the modification adversely impacts a citizen's economic expectations under the original law.

In upholding the Amendment, the Court of Appeals rejected Honeywell's anachronistic absolutist approach. Rather, it followed this Court's modern directives that laws do not receive "heightened" scrutiny where economic relations are involved; instead, even though the law might upset otherwise "settled expectations," constitutional guarantees of due process require only that a law be a reasonable means to a permissible objective. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976).

Legislative choices concerning the means to achieve legitimate public policy objectives are entitled to "strong deference." Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S.Ct. 2264, 2286-88 (1993); Usery, 428 U.S. at 15-16 (1976). This deference and minimum scrutiny are required whether a statute is prospective or retroactive. United States v. Carlton, 114 S.Ct. 2018, 2022 (1994); Usery, 428 U.S. at 15-16; Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,

467 U.S. 717, 729 (1984); Concrete Pipe & Prods., 113 S.Ct. at 2286-88.[7]

Even when a statute retroactively impairs contractual rights, and even when that impairment is substantial, the law is permissible so long as it is supported by a "significant and legitimate public purpose" and if the means selected by the legislature to accomplish its purpose are "reasonable and appropriate." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-412 (1983).

Legislative acts adjusting the burdens and benefits of economic life come to a reviewing court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an "arbitrary" and "irrational" way. Usery, 428 U.S. at 15-16. The Court of Appeals correctly found that Honeywell had failed to carry this burden.

In rejecting Honeywell's claims, the Court of Appeals properly relied upon General Motors Corp. v. Romein, 503 U.S. 181, 185, 190-191 (1992), in which this Court confirmed that retroactive statutory regulation of employer-sponsored employee benefits is not subject to any greater scrutiny than the general due process standard.

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[7] See also Landgraf v. USI Film Products, 114 S.Ct. 1483, 1501 (1994) ("the constitutional impediments to retroactive civil legislation are now modest. . . ."); Rivers v. Roadway Express, Inc., 114 S.Ct. 1510, 1519 (1994) (legislature has power to amend statute that it believes court has misconstrued, and "may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.")

In Romein, this Court unanimously rejected Contract Clause and Due Process objections to a 1987 Michigan statute which required employers to pay worker's compensation benefits which they had withheld in reliance upon a previous court opinion construing a 1981 worker's compensation statute.

This Court rejected the employers' contention that the Court must "read every workplace regulation into the private contractual arrangements of employers and employees." 503 U.S. at 190. The Court found that such a construction would "severely limit the ability of state legislatures to amend their regulatory legislation." Id.. The Court found that the retroactive aspects of the law satisfied the deferential standard articulated in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). The Court held that the retroactive amendment was supported by the "legitimate legislative purpose" of "correct[ing] the unexpected results of the Michigan Supreme Court's Chambers opinion." Id.

The Court of Appeals below also properly relied upon United States v. Carlton, in which this Court unanimously upheld a retroactive amendment to 26 U.S.C. § 2057 governing the estate tax deductibility of sales by an executor of employer securities to an employee stock ownership plan (ESOP). The Court applied the "rational basis" standard applied in Usery.[8] The Court found that the amendment was adopted as a "curative measure" to address a fact pattern not anticipated when the original legislation was passed. 114 S.Ct. at 2022. This Court concluded that in view of the unintended results from the earlier legislation, the amendment was "neither illegitimate nor arbitrary." Id. at 2023. The Court found that "Congress acted

[8]The Court specifically ruled that the due process standard applicable to retroactive tax legislation is the same as that applicable to any other kind of legislation. Id. at 2022.

to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Id.

Contrary to Honeywell's assertion, the Amendment in no sense "cancelled debts unambiguously owed" to Honeywell. Statutory rights have long been held subject to retroactive modification without implicating "vested rights.". See, Flemming v. Nestor, 363 U.S. 603, 611 (1960) (retroactive amendment of the Social Security Act terminating old-age benefits for non-U.S. residents after plaintiff had become eligible did not violate the due process clause); Phelps v. Board of Education, 300 U.S. 319 (1937) (state law establishing tenure for a certain class of teachers could be retroactively modified without offending the Contract Clause because the teachers' rights were statutory, not contractual.)[9]

Moreover, unbroken precedent dictates that statutory rights do not become "vested" until they are reduced to a final, non-appealable judgment. See Hodges v. Snyder, 261 U.S. 600, 602-603 (1923) (curative acts which take effect prior to judgment do not offend due process); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law

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[9]Indeed, in a decision issued within days of its opinion in this case, the Minnesota Supreme Court directly ruled that notions of "vested rights" have no applicability in connection with Guaranty Association legislation. See, Maxwell Communications v. Webb Publishing Co., 518 N.W.2d 830, 832-34 (Minn. 1994). Accord, Reinsurance Association v. Dunbar Kapple, Inc., 443 N.W.2d 242 (Minn. Ct. App. 1989), amendment to the Minnesota Insurance Guaranty Association Act (MIGA) (a guaranty association similar to Respondent, but for property and casualty insurers) which applied retroactively to actions commenced prior to its passage did not unconstitutionally impair vested rights.)

intervenes and positively changes the rule which governs, the law must be obeyed").[10]

B. The Court of Appeals Properly Held that Coombes and Ettor are Distinguishable and of Doubtful Weight.

Honeywell argues that the Court of Appeals failed to give proper weight to certain Supreme Court cases, in particular Coombes v. Getz, 285 U.S. 434 (1932) and Ettor v. Tacoma, 228 U.S. 148 (1913). To the contrary, the Court of Appeals properly distinguished these cases: they are not controlling and do not require overturning the Amendment.

In Coombes, the Supreme Court struck down the repeal of a California constitutional provision which had made corporate directors responsible for misappropriation of corporate funds by officers. The Court held that the repeal could not be applied retroactively because the rights were "contractual" in nature.

In Coombes, however, the "contractual" nature of the state law was not part of the United States Supreme Court's own finding, but was based upon the California Supreme Court's peculiar characterization of the particular rights. The United

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[10]See also New York Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917)("no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); 149 Madison Ave. Corp. v. Asselta, 331 U.S. 795 (1947), modifying 331 U.S. 199 (1947) (upholding amendment to the Fair Labor Standards Act retroactively depriving workers of accrued right to overtime pay. McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("[I]t is not within the power of the legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."); Landgraf v. USI Film Products, 114 S.Ct. 1483,1501 (1994)(citing Schooner Peggy with approval as support for proposition that "a Court should 'apply the law in effect at the time it renders its decision' . . . even though that law was enacted after the events that gave rise to the suit.)

States Supreme Court specifically relied on the fact that "it was conceded that the liability created by the [California] Constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors." 285 U.S. at 440 (emphasis added).[11] Here, in stark contrast, the contractual nature of the Guaranty Association Act is far from "conceded;" to the contrary, Honeywell has conceded that the Minnesota Act was not an implied term of the Executive Life GICs. Honeywell Brief Filed in Minnesota Supreme Court on Certified Questions, dated February 22, 1994, at 33. ("Plaintiffs have never claimed the Act becomes an implied term in the Executive Life GICs.").

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[11]The Minnesota Guaranty Association Act is far different from the corporate charter at issue in Coombes. Beginning with the landmark case of Dartmouth College v. Woodward, 17 U.S. 518 (4 Wheat.) (1819) corporate charters granted by a state were viewed as a unique type of contract and therefore subject to judicial oversight through the Contract Clause. See John E. Nowak and Ronald D. Rotunda, Constitutional Law 397-800 (4th ed. 1991) ("Nowak & Rotunda"). Guaranty Association laws, by contrast, are widely viewed as purely statutory in nature. See, e.g., Honeywell 518 N.W.2d at 561; Folson Pitts v. Mobile Tank Car Servs., Inc., Nos. 62927, 62928, 62929, 1993 WL 398564 (Ohio Ct. App. Oct. 7,1993) (right to file claim against Ohio Insurance Guaranty Association ("OIGA") is "a limited, statutorily-created right," not a "substantive right"); Pennsylvania Life & Health Ins. Guar. Ass'n v. Superior Court, 27 Cal. Rptr. 507, 513 (Cal. Ct. App. 1994) ("extent of the Guaranty Association's liability `is strictly restricted to statutorily-defined covered claims' and therefore its obligations are not necessarily coextensive with the insolvent insurer"); Isaacson v. California Ins. Guar. Ass'n, 150 P.2d 297 (Cal. 1988) (rejecting argument that California Insurance Guaranty Association is "assignee" of failed insurer or "stands in the shoes" of an insurer for all purposes, holding that CIGA could not be held liable for statutory or common law bad faith or intentional infliction of emotional distress in connection with claims adjustment activities); City of Greensboro v. Reserve Ins. Co., 321 S.E.2d 232, 240 (N.C. Ct. App. 1984); Virginia Property & Casualty Ins. Guar. Ass'n v. International Ins. Co., 385 S.E.2d 614 (Va. 1989).

See also Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n., 518 N.W.2d 557, 561 (Minn. 1994), n.14.[12]

Moreover, unlike in Coombes, the Minnesota Supreme Court, in response to the District Court's certified questions, held that as a matter of Minnesota law Guaranty Association rights are not contractual but are purely statutory. Id.[13]

Nor is Ettor v. Tacoma, 228 U.S. 148 (1913) controlling. In Ettor a governmental body sought to retroactively extricate itself from a statutory liability based on the city's taking of private property for a public purpose. Thus, Ettor is similar to U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) in which the Supreme Court rejected an attempt by the State of New Jersey to repeal a statutory covenant obligating it in connection with certain bonds issued by a port authority. In U.S. Trust, the Court held that because the state's "self interest" was at stake, the retroactive legislation was not entitled to the "complete

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[12]The narrow reach of Coombes is evident in Phelps v. Board of Education, 300 U.S. 319 (1937), decided only three years after Coombes. In Phelps, this Court ruled that a state law establishing tenure for a certain class of teachers could be retroactively modified without offending the Contract Clause because the teachers' rights were statutory, not contractual, thus distinguishing Coombes.

[13]Indeed, the Coombes Court itself carefully distinguished a line of cases which held that retroactive repeal of statutory rights was not unconstitutional. In each, the Court noted that the rights had been conclusively defined by the state court as statutory as opposed to contractual. Coombes, 285 U.S. at 446-7, distinguishing Moss v. Smith, 155 P. 90 (Cal. 1916)("The distinction between the section of the Code [in Moss] and the constitutional provision [in Coombes], therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual."); and distinguishing Willcox v. Edwards, 123 P. 276 (Cal. 1912) (State constitutional provision legalizing contracts for the sale of stocks on margin did not create a "vested right" but rather one dependent solely upon the constitutional provision, and therefore subject to retroactive repeal.).

deference" to which ordinary legislation is entitled. Id. at 26. Here, unlike Ettor or U.S. Trust, the Guaranty Association Act does not involve retroactive modification of a state obligation, a taking by the state of private property, or the creation of corresponding rights to compensation against the state. Benefits payable by the Association come directly from the private sector; no public funds are involved. Guaranty Association legislation is merely economic legislation addressing economic rights and obligations of private parties, and, therefore, is not subject to the strict scrutiny applied in U.S. Trust and Ettor.

In neither Ettor nor Coombes did the Court conduct the means-ends analysis required under modern due process and contract clause tests. For this reason, in addition to distinguishing Coombes and Ettor, the lead opinion below questioned whether the reasoning of these cases should be followed in light of the modern precedents. The lead opinion observed that these cases "were decided during what is referred to in the history of American jurisprudence as the Lochner era, named for the pivotal case of judicial activism, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power)." Petitioner's App. at 12a. Judge Hansen wrote that "cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently." Id. He observed that "within two years of the Coombes decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the Lochner era's strict protection of economic freedom and vested rights." Petitioner's App. 13a., quoting Home Building & Loan Ass'n v.

Blaisdell, 290 U.S 398, 438 (1934).[14] The opinion then added its voice to those who "question the continued validity of the vested rights analysis of Coombes and Ettor when reviewing the constitutionality of economic legislation. . . ." Petitioner's App. at 14a.[15]

The fact that in addition to distinguishing Coombes and Ettor the lead opinion questioned the continuing validity of the constitutional theory underpinning them in no way violated the rules set forth in Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85 (1989). That rule, prohibiting a Court of Appeals from declining to follow a Supreme Court precedent which "appears to rest on reasons rejected in some other line of decisions," applies only where the case has "direct application" in a pending case. Id. at 484-85.

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[14]See also Carlton, 114 S.Ct. at 2023-24 (cases applying strict scrutiny of retroactive legislation "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'") (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)); Gray, 467 U.S. at 733 (noting the "changes in judicial review of economic legislation" that has occurred in modern times, casting doubt on earlier decisions striking down economic legislation under the Due Process clause).

[15]In Blaisdell, the Court stressed that the Contract Clause is "not to be read with literal exactness like a mathematical formula, " 290 U.S. at 428, and that "the Court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests." Id. at 444. Honeywell's argument would do just what the Supreme Court warned against in Blaisdell. It would pervert the clause by using it as an instrument to thwart the capacity of the Minnesota legislature to protect fundamental interests of Minnesotans. A statute is a statute, and a contract is a contract. Unless the state itself is obligated by the statute, a statute is not a contract. State v. Brand, 303 U.S. 95, 58 S.Ct. 443 (1938); U.S. Trust Company of New York v. State of New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). To apply the Clause to a change in rights which are purely statutory is surely to "pervert" the clause.

In Rodriguez, this Court criticized the Fifth Circuit for failing to follow Wilko v. Swan, 346 U.S. 427 (1953) in which the Court held that claims under § 12(2) of the Securities Act were not subject to arbitration. In a case squarely on point with Wilko, the Fifth Circuit held that § 12(2) claims should be remanded to arbitration. Even though this Court affirmed the Fifth Circuit, concluding that Wilko was indeed wrongly decided, it criticized the Fifth Circuit's approach because Wilko had "direct application" to Rodriguez. Id. at 484.

Here, by contrast, neither Coombes, Ettor, nor any of the other cases upon which Honeywell relies in its petition involved retroactive amendment of a guaranty association statute. Indeed, it is fair to presume that the very notion of a "guaranty association" was not even a twinkle in the eyes of the authors of Ettor in 1913 or of Coombes in 1932. Thus, unlike in Rodriguez, none of cases upon which Honeywell relies has "direct application" to this case, and the Court of Appeals was correct in following more recent precedents. This Court has not cited Coombes since 1940, or Ettor since 1935.[16]

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[16]Numerous lower courts refused to follow Coombes or Ettor as authority for striking down retroactive legislation. See Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) (upholding statute which retroactively abolished accrued claims under the Federal Tort Claims Act for injuries suffered as a result of atomic weapons testing, distinguishing Coombes and Ettor); Seese v. Bethlehem Steel Co., 168 F.2d 58, 60-64 (4th Cir. 1948); Moss v. Hawaiian Dredging Co., 187 F.2d 442 (9th Cir. 1951) (following Seese, and upholding retroactive amendments to the Fair Labor Standards Act, holding Ettor and Coombes inapplicable); Addison v. Huron Stevedoring Corp., 204 F.2d 88, 92, n.8 (2d Cir.), cert. denied, 346 U.S. 877 (1953) (following Moss). See also Sagastivelza v. Puerto Rico Hous. Auth., 195 F.2d 289, 292 (1st Cir. 1952) (upholding constitutionality of repeal of state Eminent Domain Act after condemnation proceeding had been instituted but before trial, holding Ettor, Coombes and Forbes, inapplicable; Taxpayers v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984) (retrospective operation of state water conservancy statute did not impair "vested rights" in

In sum, contrary to Honeywell's assertion, the Court of Appeal's opinion is not in conflict with controlling Supreme Court authorities. To rule, as Honeywell requests, that one can obtain an immutable right in a statute prior to obtaining final judgment would be to overrule the long line of Supreme Court cases cited above which show precisely the opposite, and would place the kind of straight-jacket on the legislature about which this Court warned so clearly in Blaisdell, Gray, Romein, Carlton, and other cases.

II. GUARANTY ASSOCIATION RIGHTS ARE NOT CONTRACTUAL.

Honeywell contends that the Guaranty Association Act creates contractual rights, that retroactive modification of the Act is therefore subject to heightened scrutiny, and that the 1992 Amendment should have been struck down as violative of the Contract Clause. The lead opinion, however, together with the District Court and Minnesota Supreme Court, correctly rejected the notion that Guaranty Association statutes create contractual rights subject to Contract Clause protection.

"In general, a statute itself is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17, n.14 (1977) (emphasis supplied.). Here, the right to payment under the Act is not enforceable against the State of Minnesota but is an obligation imposed upon the Association, which is a private

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violation of due process, holding Coombes inapplicable; Sowell v. Am. Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989) (upholding constitutionality of retroactive amendment to FELRTCA); Atmospheric Testing Litig., 820 F.2d 982, 988-89 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988) (upholding constitutionality of retroactive amendment to Federal Tort Claims Act).

non-profit entity, not a state agency. Minn. Stat. Ann. § 61B.04, subd. 1 (West 1986). Moreover, as the lead opinion observed, there is no "indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway, 470 U.S. 451, 465-66 (1985).

The Association is not a party to Honeywell's ELIC contracts. Nor does the Act contemplate the existence of any written contract between the Association and the insurance-buying public. As the lead opinion found, the Honeywell trustee "did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs." Petitioner's App. at 9a-10a.

The lead opinion relied upon this Court's holding that "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction and enforcement of contracts." Id. at 10a, citing Romein, 503 U.S. at 189, 112 S.Ct. at 111 (emphasis supplied). The statutory provision at issue here does not concern validity, construction or enforcement of ELIC's obligation on the GICs.

In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), in describing the constitutional interests behind the Contract Clause, the U.S. Supreme Court stressed that "contracts enable individuals to order their personal and business affairs according to their particular needs and interests." Id. at 245. Here there was most certainly no "private ordering of affairs" pursuant to a contract--the rights which plaintiffs assert are set forth in a statute, imposed upon the parties by the state regardless of the parties' own perception of

their "needs and interests." As the lead Court of Appeals' opinion found, none of the elements of a contract are present: no offer, acceptance, or consideration, no privity between the Association and Honeywell, not even any proof of actual reliance by Honeywell on any particular interpretation of the Act. There is simply nothing in the Act, in any Minnesota court decision, or in the record, which provides any rationale for treating Honeywell's claim under the Guaranty Association Act as contractual in nature.

Both the lead opinion and the concurrence correctly observed that Honeywell in fact had no bargained-for expectations of coverage from the Minnesota Association when its pension-GICs were purchased. It is undisputed that at the time they were initially purchased, and for a majority of the time Honeywell's plans held them before ELIC's insolvency, the GICs were held by non-Minnesota-based trustees.[17] Under Honeywell's theory, if Executive Life had become insolvent on December 30, 1988, none of Honeywell's employees would have received protection from the Minnesota Guaranty Association because at that time the GICs were held by trustees based in California, Massachusetts, and New York.[18] Obviously, given the comings and goings of its trustees, Honeywell could have

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[17]The trustee of the Retirement Savings Plan and the Investment Plus Plan until January 1, 1989 was Chase Manhattan Bank of New York, not IDS. GA.229, 233. The only trustees of the Retirement Investment Plan until January 1, 1989 were Wells Fargo Bank of California and Wellington Trust Co. of Massachusetts. GA.237. All of the GICs at issue here were issued in 1988 and thus, obviously, could not have been originally issued to IDS. IDS Bank & Trust was substituted on the GICs as "contract owner" sometime after January 1, 1989. Honeywell has pointedly failed to produce record evidence of the exact date.

[18] Neither California nor Massachusetts provides any guaranty association protection for Executive Life GICs, and New York only provides coverage up to $1 million. GA.69.

had, and had, no expectations whatsoever concerning how, whether, or from whom the GICs in its pension plans would receive Guaranty Association protection should the issuer fail.

The lead opinion correctly focused on the distinction between the insurance or annuity contracts which govern the rights and duties of insured and insurer, and the Guaranty Association Act, which governs the rights and duties of claimants and the Association. The Association is not named or referred to in any manner in the GICs which are the subject of Plaintiffs' lawsuit. As the Minnesota Supreme Court observed, Honeywell concedes that the Act is not an implied term of the Honeywell GICs. The only source of the Association's obligations is the statute. The fact that the statute refers to the insurance contract does not change the fact that the source of the Association's obligation is the statute, not any contract.

Indeed, the Association's duties are "subject to any conditions imposed by the Association and approved by the Commissioner," and the statute authorizes the Commissioner to "limit" the Association's "liability" and "reduce" its "obligations" on a case-by-case basis. Minn. Stat. § 61B.06, subd.'s 2, 3, 8. Accordingly, policyholders cannot have any specific expectations about benefits they will receive from the Association, and the nature of those obligations can hardly be said to be "fixed" by any "contract."

Many of the cases which Honeywell cites for the proposition that Guaranty Association rights are contractual involve retroactive impairment of obligations to which the government itself is a party. See U.S. Trust, infra; U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996); Indiana Ex Rel Anderson v. Brand, 303 U.S. 95 (1938). Where the state itself is obligated by a statute to a private party, some courts have construed the statute as a "contractual" obligation between the state and the

private party, and therefore subject to Contract Clause protection. U.S. Trust, 431 U.S. at 26. Numerous courts have stressed, however, that Contract Clause treatment of statutes should be strictly limited to cases in which the state is a party to the obligation. See e.g., Brand, 303 U.S. at 100. Here, unlike in Brand and U.S. Trust, there is no allegation that the Guaranty Association Act creates contractual rights between private parties and the State of Minnesota. The State of Minnesota itself is not obligated under the Act to the insureds in any respect. The Act, like much commercial legislation, merely regulates the rights and duties of private parties who, as between themselves, have no contractual relationship.[19]

III. THE COURT OF APPEALS CORRECTLY FOUND THAT RETROACTIVITY OF THE 1992 AMENDMENT WAS FULLY JUSTIFIED UNDER MODERN DUE PROCESS AND CONTRACT CLAUSE STANDARDS.

Before the Legislature enacted the 1992 Amendment, the Act, like the Model Act upon which it was based, did not mention pensions, GICs, trustees, or plan participants. Minn. Stat. § 61B.01, et seq; GA.90-93. In responding to the district court's first certified question, the Minnesota Supreme Court specifically found that "unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977," and that, therefore, the "legislature likely did not contemplate how the Act specifically applied to these contracts." Honeywell, 518

[19]Honeywell suggests that it contributed to the Minnesota guaranty fund and then, as a result of the Amendment, lost the right to collect from that fund. If this is Honeywell's contention, it is a gross mischaracterization of fact and of Minnesota law. Assessments in connection with insurance company insolvencies are made upon member insurance companies, not upon the insurance-buying public, and only after an insurer becomes insolvent and benefits become payable. Minn. Stat.§§ 61B.07, subd. 1; 61B.07, subd. d.

N.W.2d at 561. As in Carlton, the retroactivity of the 1992 Amendment was justified by the Legislature's legitimate concern that over 10,000 Minnesota residents might end up without guaranty association coverage due to the failure of the 1977 law to specifically address coverage of pension-GICs.

Given the lack of coverage of Minnesota plan participants under the laws of Pennsylvania and other states, and the pressing need to assure that resident plan participants have the protection which the Act was designed to provide regardless of the residency of the Plan trustee, it was certainly reasonable for the Legislature to legislate retroactively in order to assure that an unanticipated coverage situation was addressed in the manner which effectuated the purposes of the Act.[20] The Court of Appeals was manifestly correct in concluding that these circumstances fully justified the retroactive application of the Amendment, under both the due process and contract clauses.

Honeywell argues that trustee coverage was unambiguous under the pre-amendment act, and cites for this proposition the decision of the Minnesota Supreme Court on the district court's first certified question. It is plain from reading the Minnesota Supreme Court's decision, however, that the court, in fact, adopted the Association's contention that specific coverage of pension-GICs was not contemplated by the legislature in 1977 when it enacted the original Guaranty Association statute, which was still in effect at the time of the ELIC insolvency. The Court held, however, that because the non-specific language employed by the 1977 legislature was broad enough to include a trustee-owner of a pension-GIC, the Court could not look beyond that

[20]Honeywell has never contended that "participant-based" coverage, per se, is "irrational". Indeed, Honeywell endorsed the "participant coverage" interpretation of the pre-Amendment law when it applied for benefits from every Guaranty Association in the nation, and it affirmatively argued this position in litigation in Arizona and New Mexico. GA.248-75.

broad language in an effort to conform the statute to legislative intent. 518 N.W.2d at 561. Far from being a "foregone conclusion," as Honeywell would have this Court believe, the Minnesota Supreme Court could easily have adopted the approach of the Pennsylvania Supreme Court in construing that state's comparably-worded guaranty association statute to require both a resident trustee and a resident participant. See Unisys 667 A.2d 1199 (Pa. Commw. Ct.), aff'd, 684 A.2d 546 (Pa. 1996). Or, like courts in New Mexico and Arizona, it could have ruled that GICs are not annuities and therefore not by the act at all. Supra, note 5.

Honeywell argues that there is no "rational connection" between the Amendment and its 27,000 non-resident plan participants, because these individuals were not responsible for the Executive Life insolvency. The lead opinion correctly held, however, that it was not necessary that there be "fault" on the part of the non-resident participants in order for the Amendment to have a rational basis. In Carlton, for example, retroactive amendment was permissible even though the litigating taxpayer was not at "fault." Rather than imposing a "penalty" on the taxpayer as Honeywell asserts, Congress sought to tax transactions for which it had previously accorded preferential treatment. Thus, certain transactions were specifically encouraged under prior law, only to be subject to retroactive taxation when Congress decided that the effect of the earlier law was "unintended." Carlton stands for the proposition that legislatures may legislate retroactively to remedy unintended consequences of earlier legislation, even when the change has an impact on citizens' expectations under prior law.

Whether or not Honeywell's non-Minnesota resident plan participants were responsible for the Executive Life insolvency is beside the point. The rights of those participants are

governed by laws of the states in which they reside. In a guaranty association system which is inherently based upon state residency, there is certainly a rational basis for a Minnesota law which determines coverage of pension-GICs based on participant residency. This particularly so where thousands of Minnesota pension plan participants are without protection from any other state guaranty association.

The Court of Appeals correctly followed the dictates of this Court in Carlton, Romein, Gray, Usery , and Blaisdell. As in these cases, the 1992 Amendment was passed to achieve a permissible legislative objective by a rational means: to avoid what the Minnesota Legislature feared might be an unintended result of the outmoded 1977 statutory language and to provide benefits to thousands of individual Minnesotans who are the intended beneficiaries of the Act's protections.

CONCLUSION

The Association respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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ATTORNEYS FOR RESPONDENT

Dated: July 28, 1997.

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Opinion Number_____

Filing Date:_____

Docket No. 17,741

CHRIS KRAHLING, Superintendent
of Insurance, State of New Mexico,

Plaintiff,

vs.

FIRST TRUST NATIONAL ASSOCIATION;
HONEYWELL, INC.; and HONEYWELL
PENSION AND RETIREMENT COMMITTEE,

Third-party Defendants/Appellants,

vs.

THE NEW MEXICO LIFE INSURANCE
GUARANTY ASSOCIATION,

Defendant/Third-party Plaintiff/Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE
COUNTY
STEVE HERRERA, District Judge

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OPINION

PICKARD, Judge.

1. This case involves the Life and Health Insurance Guaranty Fund, created pursuant to NMSA 1978, Sections 59A-42-1 to -16 (Repl. Pamp. 1995) (the Guaranty Law) and funded by insurers doing business in the state for the purpose of paying benefits to New Mexico residents when one of its member insurers becomes insolvent. As applicable to this case, the Guaranty Law covers "direct . . . annuity contracts and contracts supplemental to . . . annuity contracts, issued or assumed by an authorized insurer[.]" Section 59A-42-3(A).

2. Honeywell invested part of the deferred compensation of more than 2,250 of its New Mexico employees in guaranteed investment contracts (GICs or the contracts) purchased from

Executive Life Insurance Company (Executive Life). After Executive Life became insolvent in 1991, the New Mexico participants sought coverage from the New Mexico Guaranty Association (the Guaranty Association), which denied coverage.

3. The Guaranty Law provides that, "If a member insurer is insolvent, the association, with respect to . . . covered policies of residents issued by foreign . . . insurers, shall . . . guarantee . . . all the covered policies of the insolvent insurer[.]" Section 59A-42-7(A)(1). "'[R]esident' means any person who resides in this state . . . and to whom contractual obligations are owed." Section 59A-42-4(I).

4. The specific issues in this case are whether the GICs come within the definition of annuity contracts and whether contractual obligations are owed to the trustee of the Honeywell retirement plan, who owns the GICs and who is a Minnesota resident, or to the New Mexico resident employees. On summary judgment, the district court ruled that the GICs were not annuities within the definition of NMSA 1978, Section 59A-20-2 (Repl. Pamp. 1995), and that the obligations were not owed to New Mexico residents. On these issues of first impression, we conclude that the GICs were not annuity contracts meriting coverage under our statutory definition of annuities. We affirm the district court's decision to that effect, and therefore we do not address the court's alternative ground for denying coverage.

FACTS/BACKGROUND

5. Executive Life was an insurance company domiciled in California. The parties agree that Executive Life was insolvent in 1991 and was placed in conservatorship. Honeywell is a Delaware corporation, which has plants and employees in

New Mexico, but whose headquarters and principal place of business are in Minnesota. Honeywell sponsored for its employees various savings and retirement plans that were tax-sheltered under Internal Revenue Code § 401(k). 26 I.R.C. § 401(k) (1994). Employees who participated in these plans could defer income and choose from among several investments, including a "fixed income fund." Other investment options included a diversified stock fund, a government securities fund, a Standard and Poor's 500 fund, and a fund made up of Honeywell stock.

6. The fixed income fund invested in, among other things, a portfolio of contracts issued by insurance companies. The insurance contracts in which the fixed income fund invested are called, among other names, guaranteed investment contracts (the name the parties use on appeal), group annuity contracts (the name on one of two cover sheets for the contracts), and group limited premium deposit pension contracts (the name on another cover sheet). In essence, the contracts provided that Honeywell's trustee would deposit, within a fixed number of days or months, either a fixed amount of money or not more than a stated amount of money; the money would earn a fixed rate of interest payable annually; and the fund value would be paid to the trustee in one, two, or three installments over the course of one, two, or three years, which would occur several years after the deposit was made. All of the contracts in this case were purchased in 1988 and were to be paid after 1991 when Executive Life became insolvent.

7. The Guaranty Association sought a declaration that Honeywell's contracts with Executive Life were not within the scope of the Guaranty Law. The district court granted the Guaranty Association summary judgment holding, in part, that Executive Life's GICs issued to Honeywell were not

annuities under the New Mexico's statutory definition because they did not provide periodic payments dependent on the continuation of human life. See § 59A-20-2(A).

8. Honeywell appeals, asking this Court to enforce the Guaranty Association's obligation to provide coverage for the plan participants. For the reasons that follow, we affirm.

DISCUSSION

9. Where there is no issue of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law upon clear and undisputed facts. See First Nat'l Bank in Albuquerque v. Nor-Am Agric. Prods., Inc., 88 N.M. 74, 80, 537 P.2d 682, 688 (Ct. App. 1975). The decision here turns on the statutory definition of an annuity as applied to the GICs, not on any disputed facts. Interpretation of statutes is a question of law which we review de novo. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

10. We begin our analysis by recognizing that our decision must be based on the wording of the New Mexico statute and that cases from other jurisdictions are persuasive only to the extent that their statutes are similar to ours. See State v. Dunsmore, 119 N.M. 431, 434, 891 P.2d 572, 575 (Ct. App. 1995); El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't, 108 N.M. 795, 797-98, 779 P.2d 982, 984-85 (Ct. App. 1989). Thus, for example, cases holding that GICs are not annuities based on statutes that exclude "any annuity contract or group annuity certificate which is not issued to and owned by an individual" or cases holding that GICs are annuities based on statutes that specifically include "unallocated annuity contracts" which in turn include "guaranteed interest contracts" will not be persuasive in New

Mexico. See Oklahoma Life & Health Ins. Guar. Ass'n v. Hilti Retirement Sav. Plan, 1997 WL 10927 at *2 (Okla. 1997); Unisys Corp. v. Texas Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n, 943 S.W.2d 133, 137 (Tex. Ct. App. 1997). Rather, we decide this case based on New Mexico's statutory language, informed by cases that consider similar language under similar legislative and administrative circumstances.

11. We first consider the Legislature's stated purpose in enacting the Guaranty Law:

> The purpose of this article is to provide a mechanism to facilitate continuation of coverage, payment of covered claims under certain insurance policies, to avoid excessive delay in payment and avoid financial loss to claimants or policyholders because of insolvency of an insurer, to assist in detection and prevention of insurer insolvencies and provide an association to assess the cost of such protection among insurers.

Section 59A-42-2 (emphasis added). On its face, then, the purpose of the Guaranty Law, in its clearest terms, is to protect insureds (policyholders or claimants under policies) from loss resulting from an insurer's insolvency. More specifically, when an insurer becomes insolvent, the Guaranty Law works to protect those policyholders and claimants who would suffer loss. The import of this language is that it applies to insurance companies as insurers.

12. Honeywell argues strenuously that the GICs were annuities under New Mexico statutory law and therefore entitled to coverage by the Guaranty Association. We set out Honeywell's argument, and give our reasons for rejecting it. Honeywell's argument consists of two branches. According to

Honeywell, (1) the Executive Life GICs are annuities because they are agreements to make periodic payments dependent upon the continuance of human life; and (2) the GICs are also annuities because of the participant's right to purchase individual annuities upon retirement.

13. Section 59A-42-3(A) outlines the scope of the Guaranty Law. It states:

> A. Chapter 59A, Article 42 NMSA 1978 applies to direct life insurance policies, health insurance policies, annuity contracts and contracts supplemental to life and health insurance policies and annuity contracts, issued or assumed by an authorized insurer, or assumed by an unauthorized insurer directly or indirectly from an authorized insurer.

(Emphasis added.) New Mexico statutory law defines annuities as follows:

> A. an "annuity" is a contract under which obligation is assumed by the issuer to make periodic payments for a specific term or terms where the making or continuance of all or some such payments or the amount of any such payment is dependent upon continuance of human life. . . .

Section 59A-20-2 (emphasis added). Honeywell argues that the GICs were annuities because Executive Life's "obligations as to each participant's investment in the GICs were 'dependent upon the continuance of human life[.]'"

14. Excluding those cases that interpret materially different statutes for the reasons stated above and excluding those cases

that appear to simply follow what we perceive to be the two leading cases, we find that the opposing views and arguments are well set forth in Board of Trustees of Maryland Teachers & State Employees Supplemental Retirement Plans v. Life & Health Insurance Guaranty Corp., 642 A.2d 856 (Md. 1994) (holding Executive Life GICs to be annuities) [hereinafter Board of Trustees], and Arizona Life & Disability Insurance Guaranty Fund v. Honeywell, Inc., 927 P.2d 806 (Ariz. Ct. App.) (holding Executive Life GICs not to be annuities), review and cross-petition for review granted (1996) [hereinafter Arizona Life]. Honeywell relies heavily on the Maryland case. There, the court found the same GICs as those in question here to be annuities under Maryland law. The court looked at the possibility that Executive Life could be called upon, whenever a participant died, to pay its pro rata share of that participant's account in the plan at the promised rate of interest. Board of Trustees, 642 A.2d at 861. The court also looked to the fact that if Executive Life was called upon to pay prematurely in the event of a participant's death, the company's investment returns at that particular moment might be less than what it was committed to pay at maturity. This situation would make Executive Life's assumption of economic risk life-contingent insofar as Executive Life risked economic loss if a participant died before maturity of the GIC. Id. The court added that Executive Life's contractual assumption included the economic risk, though remote, "that a catastrophe or epidemic would result in the deaths of large numbers of participants in a relatively brief span of time." Id.

15. The Guaranty Association answers that the Executive Life GICs were not annuities because Executive Life was not promising periodic payments to anyone over the course of a lifetime, such that payments would continue beyond a fixed

term if a beneficiary continued to live past that time. The Guaranty Association argues that assumption by the insurer of the risk of longevity is key to the definition of an annuity. As authority for its position, the Guaranty Association relies on the Arizona case. The Arizona Life court, examining the statutory definition and Honeywell's similar argument there, said an annuity existed where

> some or all of the payments from the financial institution to the annuitant "is dependent upon the continuance of human life." A.R.S. § 20-254.01 (1990) (emphasis added). Honeywell's interpretation of the statute would require us to hold that a contract is an annuity if the making or amount of the payments "may" depend on the continuance of human life, or if the payments "potentially" depend upon the continuance of human life. [Executive Life's] payments were not affected by the death of an employee alone, but were affected only if the trustee also elected to pay the employee's benefits by a withdrawal from the GIC. This further condition means that payments under the GIC's did not depend on the continuance of human life.

Arizona Life, 927 P.2d at 811-12.

16. We find no particular fault with the Maryland Court of Appeals' analysis in Board of Trustees. We note, however, that there was an extensive legislative history in Maryland, as well as attorney general opinions and insurance commission interpretations of Maryland law to justify that court in deciding that the GICs were annuities. Board of Trustees, 642 A.2d at 862-66. In addition, the court was able to construe Maryland's statutory definition of annuities more broadly

than we may here. That state's definition included contracts "providing for" annuities, and the court could more reasonably construe this language as encompassing the GICs with options specifying annuities. Id. at 861. There is, however, no such history or statutory language in New Mexico. We simply face our statutory definition of annuities and the GICs. Therefore, based on New Mexico's plain statutory language and the nature of the GICs in this case, we conclude that the Arizona Life court's analysis provides a better rationale for deciding this case.

17. The Guaranty Association also answers Honeywell's assertion that the GICs were annuities by arguing that the GICs did not mandate withdrawals upon the death of a plan participant; the GICs only provided for that as a possibility. In its reply brief, Honeywell says that this argument is wrong because the plan required withdrawal upon the death of a participant. The plan, however, does not dictate that payment come from the GICs. Rather, the plan left withdrawals of the funds from the GICs to the trustee's discretion. The trustee had the discretion to pay the beneficiary from funds other than Executive Life, without demanding premature withdrawal of a portion of the GIC. The Guaranty Association represents that in fact funds have rarely, if ever, been withdrawn prematurely; death benefits were paid from other funds. The plan only required that plan benefits be distributed upon a participant's death, but the source of the funds with which to pay the plan benefits was left open ended. Also going against Honeywell is that the very section of the "Investment Plus Plan" it cites to, claiming withdrawals were mandatory, allows a participant's beneficiary to choose an annuity instead of payment. The option of expressly choosing an annuity in place of payment

after the death of a participant implies strongly that the payment was not itself an annuity.

18. We agree with the Guaranty Association. Under the GICs, a plan participant held an option to purchase an annuity after retirement. This option is perhaps the clearest demonstration that the GICs were not themselves annuities. An option to purchase an annuity does not create an annuity contract, only the possibility of a separate contract for an annuity in the future. See Arizona Life, 927 P.2d at 814 (provision allowing purchase of annuity is not itself an annuity); see also Boothe Fin. Corp. v. Loretto Block, Inc., 97 N.M. 496, 498, 641 P.2d 527, 529 (Ct. App. 1982) (exercise of option to purchase land converted option to bilateral contract). Since only an exercise of the option to purchase an annuity contract could create an annuity, it follows that the Executive Life GICs were not themselves annuity contracts.

19. We hold that the Executive Life GICS were not annuities under Section 59A-20-2 because payment was not dependent upon continuance of human life. Payment did not depend on the continuation of human life because there was no requirement for the trustee to pay out of the GICS whether an employee died, retired, or transferred funds. But even if the trustee had to pay out of the GICS at the death of a participant, this seems to make payment contingent not upon the continuance of human life, but contingent upon death, the very opposite of what defines an annuity. Payment did not continue in the event of the continuance of human life as required by the statute.

20. Honeywell attempts to counter this argument by its contention that the GICs were required to be paid in installments over the course of several years and would not be paid in the same amounts if participants died and the trustee were to elect to pay those participants' shares out of the

GICs, as the documents allowed. Thus, Honeywell contends that the GICs come within the exact definition of annuity under Section 59A-20-2(A), i.e., (1) periodic payments (2) dependent on the continuation of human life. We disagree because Honeywell's argument rests on a possibility that "may" occur--the trustee's election to take participants' shares out of the GICs--whereas the statutory definition states that "an 'annuity' is [not "may be"] a contract . . . to make periodic payments . . . where the making or continuance of all or some such payments or the amount of any such payment is [not "may be"] dependent upon continuance of human life." To the extent that Honeywell's argument ignores the precise wording of the statute, we must reject it. See Arizona Life, 927 P.2d at 811-12 (rejecting this same argument for the same reasons). We therefore approve the decision of the trial court on these grounds.

21. Finally, Honeywell argues generally that the purpose of the Guaranty Association is to protect New Mexico residents. As such, Honeywell urges us to liberally construe the Guaranty Law because of its humanitarian policy and to enforce coverage in this instance. We decline to give the Guaranty Law any construction but a reasonable one since the languageof the statute is clear as applied to the GICs in this case. See United Water N.M. Inc. v. New Mexico Pub. Util. Comm'n, 121 N.M. 272, 276, 910 P.2d 906, 910 (1996) (statute should be given reasonable interpretation in accordance with the Legislature's apparent purpose); see also Unisys Corp., 943 S.W.2d at 140 (even though Texas Guaranty Act provided for liberal construction, court was not permitted to ignore statutory language excluding coverage of certain unallocated annuity contracts). We therefore decline to construe the Guaranty Law more broadly than its plain languageallows.

CONCLUSION

22. For the foregoing reasons we affirm the district court's decision.

23. **IT IS SO ORDERED.**

s/s
LYNN PICKARD, Judge

WE CONCUR:

s/s
THOMAS A. DONNELLY, Judge

s/s
RICHARD C. BOSSON, Judge